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FILED
JUN 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1182

In the
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION; and COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs and Respondents.
and
JENNIFER GRANHOLM, et al.,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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Petitioners Michigan Civil Rights Initiative Committee (MCRIC) and American Civil Rights Foundation (ACRF) respectfully file this reply to the Briefs in Opposition filed by Respondents Chase Cantrell, et al. (Cantrell Opp.) and Regents of the University of Michigan, et al. (Regents Opp.).

INTRODUCTION

The Briefs in Opposition argue that review by this Court is unwarranted because the analysis of Federal Rule of Civil Procedure 24(a)(2) by the Sixth Circuit Court of Appeals is correct, even though it followed a recent decision that "altered the Rule 24(a) landscape." Petitioners' Appendix (App.) A-25 (Kennedy, C.J., concurring in part and dissenting in part). In so arguing, the Briefs in Opposition disclaim the direct conflict between the Ninth and Sixth Circuits on whether drafters and sponsors of citizen initiatives, who have expended time, effort, and money in supporting and defending their initiatives in pre-election challenges, should be permitted to intervene as of right under Rule 24(a)(2) to defend the newly adopted laws when those laws are challenged in post-election lawsuits.

The issues that must be decided in this case are (1) whether drafters and supporters of citizen initiatives have sufficient interest in the action to permit them to intervene as of right in post-election litigation when the outcome of that litigation may invalidate the newly adopted law; and (2) when citizens resort to the initiative process to adopt new laws prohibiting the state and its political subdivisions from taking certain actions, whether there is a conclusive presumption that the government cannot adequately defend the citizen initiative in post-election

challenges, thereby authorizing drafters and sponsors of citizen initiatives to intervene as of right.

The Briefs in Opposition distort the reach of MCRIC's and ACRF's Petition by asserting that the Petitioners seek a "wholesale replacement" of Rule 24(a)(2). Cantrell Opp. at 3. To the contrary, Petitioners seek only a conclusive presumption that the primary drafters and sponsors of citizen initiatives have an interest in the outcome of litigation challenging their measure's validity that is sufficient to allow the group to intervene in such litigation as a matter of right; and that when the newly adopted law prohibits certain types of actions by the state and its political subdivisions there is a corresponding conclusive presumption that the government cannot adequately defend the citizen initiative.

I

THE DIRECT CONFLICT BETWEEN THE SIXTH CIRCUIT AND THE NINTH CIRCUIT CANNOT BE MINIMIZED OR IGNORED

The majority opinion of the Sixth Circuit departs radically from established Rule 24(a) jurisprudence, which includes cases from this Court, the Ninth Circuit, and earlier Sixth Circuit cases. *Coalition to Defend Affirmative Action, et al. v. Granholm, et al.*, App. A-25. The majority opinion below recognized expressly the inter-circuit conflict by noting that Petitioners' bid for intervention was supported by "several Ninth Circuit decisions," but determining that "our precedent requires a contrary conclusion." App. A-15.

In particular, the decision below directly conflicts with the Ninth Circuit cases of *Prete v. Bradbury*,

438 F.3d 949 (9th Cir. 2006), *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983), and *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983). Nevertheless, the Briefs in Opposition argue that no such conflict exists, and the Sixth Circuit opinion is consistent with Ninth Circuit precedent in finding that drafters and sponsors of citizen initiatives do not have a substantial legal interest in defending their initiative in post-election challenges. Cantrell Opp. at 12-14; Regents Opp. at 8-11.

As was pointed out in the Petition, it is well settled in the Ninth Circuit that drafters and sponsors of citizen initiatives have an interest in defending that initiative. "DWW, as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a)." *Spellman*, 684 F.2d at 630. This was the position of the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), and *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999), and remained the jurisprudence of the Sixth Circuit until 2007 when it handed down the decision in *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007).

The dissent below observed that the *Northland* decision "altered the Rule 24(a) landscape. Prior precedent was consistent in holding that 'interest' was to be construed liberally and 'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" App. A-25 (Kennedy, C.J., concurring in part and dissenting in part).

The facts of *Northland* cannot be distinguished from those before the Ninth Circuit in *Spellman*, 684 F.2d at 629. Both cases involved a voter approved initiative. Both cases involved public interest groups that were intimately involved in the adoption of the measures. Both groups sought to intervene in constitutional challenges to the newly adopted laws. Yet, unlike the Sixth Circuit, the Ninth Circuit in *Spellman* recognized that citizen-group sponsors have a cognizable interest in defending that legislation. 684 F.2d at 629. Significantly, the citizen group in *Spellman* was *not* regulated by the initiative—a consideration the Sixth Circuit in *Northland* found to be critical in denying intervention as of right.

The Cantrell Respondents place too much reliance on *Prete*, 438 F.3d 949, in arguing that the interpretation of the substantial interest factor of Rule 24(a)(2) by the Ninth Circuit and Sixth Circuit is consistent. Cantrell Opp. at 14. In *Prete*, a citizen initiative added a provision to the Oregon Constitution regarding payment of electoral petition signature gatherers. *Id.* at 951-52. The plaintiffs challenged the measure as violating the First Amendment. The chief petitioner and main supporter moved to intervene and the Ninth Circuit reaffirmed that "for purposes of intervention as of right, a public interest group that has supported a measure (such as an initiative) has a 'significant protectable interest' in defending the legality of the measure." *Id.* at 954 (citation omitted).[1]

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[1] In *Prete*, the Ninth Circuit found that there was no evidence in the record to show that the government was unable to adequately defend the new campaign law. Here, in contrast, because Proposal 2 prohibits state actions, Petitioners believe that there is a conclusive presumption that government cannot adequately

(continued...)

The protectable legal interest in these cases arose from the mere fact that proposed intervenors were the sponsors of the citizen initiatives—irrespective of the economic/regulatory nature of the proponents' interests or substantive/procedural grounds for the challenge.

Likewise, the Cantrell Respondents read too much into this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).[1] Cantrell Opp. at 5. In *Arizonans for Official English*, this Court expressed "grave doubts" as to whether the proponents of a ballot initiative *had Article III standing to pursue appellate review* of a district court decision. 520 U.S. at 44. This is not an issue in this case.

Here, MCRIC and ACRF are simply attempting to intervene as defendants in a lawsuit that is challenging the constitutionality of a new law they drafted and sponsored. They are asking to be placed in the same position as the drafters and sponsors of citizen initiatives who seek to intervene in the Ninth Circuit, where it would be recognized that they have a substantial legal interest in Proposal 2's continued validity sufficient to merit intervention as of right. The direct and dramatic conflict between the Ninth and Sixth Circuits should be resolved by this Court.

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[1] (...continued)
defend the new law when it is challenged on constitutional grounds.

II

THE PRIMARY DRAFTERS AND SPONSORS OF CITIZEN INITIATIVES ARE ENTITLED TO A CONCLUSIVE PRESUMPTION OF AN INTEREST IN ANY POST-ELECTION CHALLENGE TO THEIR MEASURE SUFFICIENT TO SUPPORT INTERVENTION AS OF RIGHT

The Cantrell Respondents fear the outcome of a rule that Petitioners do not advocate, asserting that "Petitioners do not identify *which* supporters of a ballot initiative should in their view have a *per se* right to intervene such litigation." Cantrell Opp. at 3. But Petitioners do not advocate a *per se* right to intervene. Rather, Petitioners urge that the existing presumption in favor of intervention take a specific form in the context of citizen instigated ballot initiatives. Petitioners assert that there should be a conclusive presumption that the primary drafters and sponsors responsible for an initiative measure being adopted by the electorate have a significant interest in the outcome of post-election litigation challenging the newly adopted law's validity, entitling them to intervene as of right. Once it is established that the applicants for intervention are the primary drafters and sponsor of the new law, such a rule disposes of but one of the four factors in the Rule 24(a)(2) analysis.

Second, the Cantrell Respondents aver to ACRF being an "out-of-state" organization that "is not an official ballot-question committee," and imply that ACRF is no different than any other advocacy group that has an interest in ballot-enacted legislation. Cantrell Opp. at 10. However, both the district court

and the Sixth Circuit have found otherwise. It is well within the district court's competency to distinguish between a group that merely supports a ballot measure and a group that drafts, sponsors, or otherwise is the primary reason for the measure being on the ballot and being adopted by the voters. And here, the district court did just that, finding that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without [ACRF's and MCRIC's] efforts." App. B-14. The Sixth Circuit acknowledged this finding, adding that "MCRI and the ACRF worked together, expending labor and funds, to see that Proposal 2 found its way on Michigan's November 2006, general election ballot and to see that the Michigan voters approved Proposal 2." App. A-15.

The drafters and sponsors of citizen initiatives possess unique expertise and knowledge concerning those measures that other potential intervenors lack. *See* Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 Colum. L. Rev. 157, 169 (1989) (comparing the expertise of the drafters of initiatives to that of professional legislators). Groups such as MCRIC and ACRF devote their time, effort, and money, often over an extensive period, researching and drafting the measures they sponsor, circulating petitions, placing the measure on the ballot, campaigning for their passage, and frequently supporting and defending their initiatives against pre-election legal challenges. Indeed, this special relationship to a successful ballot initiative may be recognized by the parties in post-election litigation challenging the validity of successful measures. Here, for example, although ACRF's and MCRIC's application for intervention was opposed by

Respondents, depositions were taken from officers of both organizations to examine the motives and intent underlying Proposal 2. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008) (citing to depositions of Connerly and Gratz taken by parties below, including the Cantrell Respondents).

Limiting the presumption Petitioners advocate to such groups would ensure that those with the greatest expertise, knowledge, and commitment to newly adopted initiatives would not be denied intervention of right because of an allegedly insufficient legal interest in the outcome of post-election challenges to their measures. But it would not, as the Cantrell Respondents warn, "constitute a blanket license for virtually any advocacy group to inject itself into litigation addressing ballot-enacted legislation of concern to them." Cantrell Opp. at 10.[2]

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[2] Neither would such a rule have any applicability to popular referenda, as intimated by the Cantrell Opp. at 11-12. The referendum power refers to the right of the electorate to endorse or nullify laws recently enacted by the Legislature. This is wholly distinct from the initiative process, by which the people are enabled to draft and enact laws of their own choosing. *See Rossi v. Brown*, 889 P.2d 557, 560-63 (Cal. 1995). Only citizen initiatives are at issue in the present case.

III

THERE SHOULD BE A CORRESPONDING PRESUMPTION THAT A STATE OFFICIAL CANNOT ADEQUATELY REPRESENT THE INTERESTS OF DRAFTERS AND SPONSORS OF A CITIZEN INITIATIVE THAT WOULD BE ENFORCED AGAINST THE STATE AND ITS POLITICAL SUBDIVISIONS

Respondents argue that the adequacy of the Michigan Attorney General's representation of Petitioners' interests should be determined, *ex post*, by the success of his pursuit of summary judgment in the ongoing litigation over the validity of Proposal 2. *See* Regents Opp. at 16; Cantrell Opp. at 9. These arguments are misguided. The test for adequate representation for purposes of Rule 24(a)(2) must be applied *ex ante*, based on whether there is a possibility that the representation of a proposed intervenors' interest by the existing parties *may be* inadequate. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).

In the present case, Petitioners easily met their "minimal burden" of establishing that their representation by an official of the State of Michigan—against whom Proposal 2 would be enforced—might well be inadequate. *See* Petition for Writ of Certiorari (Petition) at 17-24. The Attorney General's immediate acquiesence in an injunction suspending the enforcement of Proposal 2 against the University Defendants, App. B-5, defending the stipulation, and his failure immediately and vigorously to oppose the Cantrell Respondents' motion to alter or

amend the order of summary judgment currently pending in the district court[3] amply demonstrate the reasonableness of Petitioners' concerns.

The Cantrell Respondents complain that Petitioners "conflate" the adequacy of the state's representation of their interest in maintaining the legality of Proposal 2, with the substantiality of that interest itself. Cantrell Opp. at 7. As was pointed out in the Petition, however, the Sixth Circuit was unanimous on this very point: *both* the majority and the dissent reasoned that the substantiality of Petitioners' interest in intervening under Rule 24(a)(2) was virtually coterminous with the adequacy of the Attorney General's representation of that interest. *See* Petition at 18-19. This is no more than a recognition that the two substantive elements of Rule 24(a)(2) "often are very interrelated and the ultimate conclusion reached as to whether intervention is of right may reflect that relationship." 7C Charles Alan Wright, et al., *Federal Practice & Procedure* 297 (2007).

It is undoubtedly true, as the Cantrell Respondents aver, that "elected government officials can, at least in many instances, both defend and enforce the laws of their states." Cantrell Opp. at 12. But such a truism sheds little light on the institutional capacity of such officials to vigorously represent the interests of citizens who have sought, through the initiative process, to implement measures limiting the discretion and authority of those very officials.

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[3] *See Coal. to Defend Affirmative Action, et al. v. Granholm, et al.*, No. 2:06-CV-15024-DML-RSW, Docket No. 253 (E.D. Mich. filed Apr. 1, 2008).

Potential inadequacy of representation in such cases may be inferred when "the intervenor offers a perspective which differs materially" from the public official charged with representing the interests of the proposed intervenor. *Sagebrush Rebellion*, 713 F.2d at 528. Yet, "the very act of resorting to a ballot initiative indicates a rift between the initiative's proponents and voters and their elected officials on the issue that underlies the initiative." *Bates v. Jones*, 904 F. Supp. 1080, 1087 (N.D. Cal. 1995). It defies reason and obviates the democratic principles underlying the initiative process to presume that state officials will vigorously and wholeheartedly reverse their nature the morning after election day, to suddenly become the champions of the political outsiders who fought a long and sometimes bitter campaign to limit the authority of those very officials.

Employing a conclusive presumption of inadequate representation by state officials in this class of cases would not, as the Cantrell Respondents assert, amount to "the wholesale replacement of the intervention inquiry under Rule 24(a)(2)" or the creation of "an unnecessary and counterproductive *per se* rule." Cantrell Opp. at 3. Rather, the conclusive presumption Petitioners advocate would recognize and embody the fundamental democratic principle of the initiative process: "to enable citizens to enact public policy directly and, in so doing, to overturn the dominion of interest groups and of state and local party machines." Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. Cal. L. Rev. 949, 949 (2005).

Petitioners do not argue that "every member of every state's government is categorically unable to

defend any piece of ballot-enacted legislation." Cantrell Opp. at 12. Rather, Petitioners maintain that when an initiative has been adopted by the electorate, and that initiative is to be enforced against the state itself, there should be a conclusive presumption that state agents cannot adequately represent the interest of the initiative's drafters and sponsors in post-election litigation over the validity of the initiative they brought into being.

IV

THE REMAINING CRITERIA FOR INTERVENTION AS OF RIGHT UNDER RULE 24(a)(2) HAVE BEEN MET IN THIS CASE

The Regent Respondents claim that even if Petitioners had substantial legal interests in the outcome of this litigation, Petitioners' motion was untimely (Regents Opp. at 12-13). The record in this matter is sufficient to establish that the district court abused its discretion as to the timeliness of Petitioners' motion.

In his dissent below, Judge Kennedy noted that the district court's finding that Petitioners' motion to intervene was untimely constituted an abuse of discretion. *See* App. at A-30. The fact that two motions to intervene were filed with the district court the same day, one of which was granted (the Attorney General's) and the other one of which was deemed untimely (the Petitioners'), cannot be explained or justified by any principle of law or logic. It is a patent abuse of discretion.

CONCLUSION

Because this case offers an opportunity for the Court to provide needed guidance on important questions of federal law, the Petition for Writ of Certiorari should be granted.

DATED: June, 2008.

Respectfully submitted,

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